No. 89-1027

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NORFOLK AND WESTERN RAILWAY COMPANY, *et al.*,
Petitioners,

v.

AMERICAN TRAIN DISPATCHERS ASSOCIATION, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

---

BRIEF FOR PETITIONERS NORFOLK AND WESTERN RAILWAY COMPANY AND SOUTHERN RAILWAY COMPANY

JEFFREY S. BERLIN
(Counsel of Record)
MARK E. MARTIN
RICHARDSON, BERLIN & MORVILLO
2300 N Street, N.W.
Suite 625
Washington, D.C. 20037
(202) 663-8902

WILLIAM P. STALLSMITH, JR.
Three Commercial Place
Seventeenth Floor
Norfolk, Virginia 23510
(804) 629-2815

Attorneys for Petitioners

May 25, 1990

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Does the exemption "from all other law" in the Interstate Commerce Act, 49 U.S.C. § 11341(a), which applies to a railroad participating in a transaction that has been approved by the Interstate Commerce Commission, extend to claims that are based on the railroad's contracts and are asserted exclusively under federal law?

LIST OF PARTIES

The parties in the Court of Appeals were the American Train Dispatchers Association, petitioner; the Interstate Commerce Commission and the United States of America, respondents; and Norfolk and Western Railway Company and Southern Railway Company,[1] intervenors in support of the respondents.[2]

---

[1] The list of companies affiliated with Norfolk and Western Railway Company and Southern Railway Company required by this Court's Rule 29.1 has previously been supplied in the Petition for a Writ of Certiorari, at pp. ii-iv.

[2] The decision in the Court of Appeals also covered that court's Case No. 88-1724, *Brotherhood of Railway Carmen v. Interstate Commerce Commission*. The parties in Case No. 88-1724 were petitioner Brotherhood of Railway Carmen, Division of Transportation-Communications International Union; respondents Interstate Commerce Commission and United States of America; and intervenor CSX Transportation, Inc. This Court, in its Case No. 89-1028, has granted certiorari in D.C. Cir. Case No. 88-1724, and has consolidated Case No. 89-1028 with the instant case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

Decisions of the Interstate Commerce Commission

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1027

NORFOLK AND WESTERN RAILWAY COMPANY, *et al.*,
Petitioners,

v.

AMERICAN TRAIN DISPATCHERS ASSOCIATION, *et al.*,
Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The District Of Columbia Circuit**

BRIEF FOR PETITIONERS NORFOLK AND WESTERN RAILWAY COMPANY AND SOUTHERN RAILWAY COMPANY

OPINIONS BELOW

The July 25, 1989 decision of the Court of Appeals is reported at 880 F.2d 562 and is reprinted in the Appendix to the Petition for a Writ of Certiorari ("89-1027 Pet. App.") at 1a. The Court of Appeals' order of September 29, 1989, amending the decision, is not reported and is reprinted at 89-1027 Pet. App. 27a. The decision of the Interstate Commerce Commission dated May 28, 1988, which was the administrative

decision under review in the Court of Appeals, is not reported and is reprinted at 89-1027 Pet. App. 29a.

JURISDICTION

The Court of Appeals entered its decision on July 25, 1989. Norfolk and Western Railway Company ("NW") and Southern Railway Company ("Southern") filed a timely petition for rehearing, which was denied in an order entered on September 29, 1989 (89-1027 Pet. App. 49a). The petition for a writ of certiorari was filed on December 28, 1989, and was granted on March 26, 1990 (J.A. 43).[3] Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

49 U.S.C. § 11341(a), a section of the Interstate Commerce Act, provides:

> The authority of the Interstate Commerce Commission under this subchapter is exclusive. A carrier or corporation participating in or resulting from a transaction approved by or exempted by the Commission under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws

[3] Citations in this form refer to the consolidated Joint Appendix filed in connection with this case and with the companion *CSX Transportation, Inc. v. Brotherhood of Railway Carmen, et al.*, No. 89-1028.

> and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction. However, if a purchase and sale, a lease, or a corporate consolidation or merger is involved in the transaction, the carrier or corporation may carry out the transaction only with the assent of a majority, or the number required under applicable State law, of the votes of the holders of the capital stock of that corporation entitled to vote. The vote must occur at a regular meeting, or special meeting called for that purpose, of those stockholders and the notice of the meeting must indicate its purpose.

STATEMENT OF THE CASE

The Interstate Commerce Commission ("ICC") has broad authority to approve proposed railroad consolidations that the ICC finds to be in the public interest. 49 U.S.C. §§ 11343-44. When the ICC does so, a provision of the Interstate Commerce Act, 49 U.S.C. § 11341(a), provides that a person participating in the approved transaction is "exempt from the antitrust laws and from all other law . . . as necessary to let that person . . . carry out the transaction. . . ." This case concerns the reach of the § 11341(a) exemption.

In 1982, the ICC approved the coming together of NW and Southern under the common control of Norfolk Southern Corporation ("Norfolk Southern"). *Norfolk Southern Corp.—Control—Norfolk & Western Ry. and Southern Ry.*, 366 I.C.C. 173 (1982) ("*Norfolk*

Southern Control"). The ICC authorized the consolidation of facilities among the various Norfolk Southern-controlled railroads in the interest of operational efficiency, and directed, in accordance with a provision of the Interstate Commerce Act, 49 U.S.C. § 11347, that employees affected by any such consolidations—including those not detailed in the original Norfolk Southern operating scheme—were to receive the extensive benefits (including wage protection for up to six years) prescribed in the ICC's "*New York Dock*" employee protective conditions.[4] 366 I.C.C. at 230-31.

In 1986, as part of the ongoing process of consolidating their operational functions, NW and Southern decided to consolidate at one location the function of "distribution of power"—the assignment of locomotives to particular trains and facilities. Until then, power distribution on NW was performed in a facility in Roanoke, Virginia (the System Operations Center, or "SOC") by employees known as "SOC supervisors," who were represented by respondent American Train Dispatchers Association ("ATDA") and worked under a labor agreement to which the parties were NW and ATDA. In contrast, power distribution on Southern was performed in Atlanta, Georgia, by company officers—nonunion management employees known as Superintendents Transportation-Locomotive ("STLs").

The railroads proposed that power distribution for the entire Norfolk Southern system would now be

[4] These conditions were adopted by the ICC in *New York Dock Ry.—Control—Brooklyn Eastern District Terminal*, 360 I.C.C. 60, *aff'd sub nom. New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979).

performed by Southern at its Atlanta facility. Because this rearrangement was to be carried out under authority of the ICC's original *Norfolk Southern Control* decision, the railroads recognized that the *New York Dock* protective conditions would apply. Accordingly, as required by Art. I, § 4 of the protective conditions, the railroads notified ATDA of the proposal and offered to negotiate an "implementing agreement" to cover the transaction.[5]

Negotiations failed. The railroads wanted Southern to continue to handle power distribution using STLs, and they proposed to offer all the NW SOC supervisors management jobs as Southern STLs. This would result in the employees' receiving substantial *increases* in wages and benefits, as well as generous relocation allowances and the assurance of six years' wage protection under the *New York Dock* conditions. ATDA maintained, however, that the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* ("RLA"), and the SOC supervisors' labor agreement would not permit this

[5] Art. I, § 4 of the protective conditions requires the railroad to give 90 days' written notice of a transaction that "may cause the dismissal or displacement of any employees, or rearrangement of forces," and, if requested, to negotiate an "agreement with respect to application of" the protective conditions to the transaction. The section also provides that "[e]ach transaction which may result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4." If the parties are unable to agree on the terms of this so-called "implementing agreement," either party may submit the dispute to binding arbitration. 360 I.C.C. at 85.

result, and that the NW power distribution work could be moved to Atlanta only if the existing NW/ATDA labor agreement moved to Atlanta with the work and continued to cover the NW SOC supervisors in their new location.

The railroads invoked arbitration under Art. I, § 4 of the protective conditions, and, following a hearing, the arbitrator issued an award in which he imposed an implementing agreement.[6] The arbitrator authorized the transfer of work from Roanoke to Atlanta as proposed by the railroads. He also ruled that NW SOC supervisors who accepted STL positions with Southern could not carry their existing labor agreement with them to Atlanta but would become Southern officers. The implementing agreement he imposed provides, *inter alia*, that "[w]here rules, other agreements and practices conflict with this agreement, the provisions of this agreement shall apply." J.A. 31.[7]

---

[6] *Norfolk & Western Ry. and Southern Ry. and ATDA*, May 19, 1987 (Harris, Arb.) The arbitrator's award is reproduced in the Joint Appendix at J.A. 8-32. Technically, the award was rendered by a three-person "committee" or "panel" established by agreement of the parties; the panel consisted of a neutral referee (the arbitrator), one member representing the railroads, and one member representing the union. For this reason, the ICC decision below refers to the award as the "panel's" decision. The railroad member of the panel concurred in the arbitrator's award and the union member dissented.

[7] The transfer of power distribution work took place on June 6, 1987. Southern offered STL positions to all nine active and all three furloughed NW SOC supervisors, and nine of the total accepted and moved to Atlanta.

ATDA sought review of the award by the ICC.[8] The ICC affirmed the award in all respects, holding, *inter alia*, that the arbitrator

> correctly found . . . that the terms of [*Norfolk Southern Control*] and specifically the compulsory, binding arbitration required by Article I, section 4 of *New York Dock*, took precedence over RLA procedures whether asserted independently or based on existing collective bargaining agreements. Moreover, an action taken under our control authorization is immunized from conflicting laws by section 11341(a). The proposed transfer, although not specifically mentioned in *Norfolk Southern Control*, is one of the future coordinations and public benefits expected to flow from, and is therefore part of, the control transaction that we approved.

89-1027 Pet. App. 35a (citations omitted). On the merits of the case, the ICC agreed with the arbitrator's decision not to impose the NW/ATDA labor agreement on work in the consolidated Atlanta office—relief sought by ATDA—finding that to impose that agreement "would jeopardize the transaction because the work rules it mandates are inconsistent with the

---

[8] The ICC exercises authority to review the awards of arbitrators acting under the employee protective conditions. *International Brotherhood of Electrical Workers v. ICC*, 862 F.2d 330 (D.C. Cir. 1988). *See United Transportation Union v. Norfolk & Western Ry.*, 822 F.2d 1114 (D.C. Cir. 1987) (arbitration award is not reviewable under RLA but is exclusively subject to review under Interstate Commerce Act), *cert. denied*, 484 U.S. 1006 (1988).

carriers' underlying purpose of integrating the power distribution function." 89-1027 Pet. App. 37a.

ATDA sought judicial review of the ICC's decision under 28 U.S.C. §§ 2321(a) and 2341 *et seq.*[9] In the Court of Appeals, ATDA's principal contention was that the ICC exceeded its jurisdiction by upholding the arbitrator's authority to allow the transfer of work rather than remitting the parties to the RLA procedures for negotiating changes in agreements, 45 U.S.C. § 156.

In its July 25, 1989 decision covering this case and the companion *Brotherhood of Railway Carmen v. ICC*, the Court of Appeals resolved only the first of what it perceived to be three primary questions relating to the reach of the ICC's power under the Interstate Commerce Act presented by this case. The court, concluding that § 11341(a) reaches only "positive enactments," not contracts, 89-1027 Pet. App. 18a, held that § 11341(a) "does not grant the ICC its claimed power to override provisions of a [collective bargaining agreement]," 89-1027 Pet. App. 26a, and reversed the ICC on this point.

The Court of Appeals declined to decide what it took to be the separate question whether 49 U.S.C. § 11341(a) "may operate to override provisions of the RLA" itself. 89-1027 Pet. App. 19a. And the court also declined to address the ICC decision's conclusion

[9] ATDA filed its petition for review in the United States Court of Appeals for the Eleventh Circuit. NW and Southern obtained leave to intervene in the review proceeding as of right, under 28 U.S.C. §§ 2323 and 2348 and Fed. R. App. P. 15(d). By order of September 15, 1988, the Eleventh Circuit transferred the case to the District of Columbia Circuit.

that the arbitration procedure in the *New York Dock* conditions, adopted under § 11347, displaces RLA-derived rights. 89-1027 Pet. App. 25a-26a. The court remanded the case with respect to the issues it had not addressed "in order that the agency may determine whether further proceedings are necessary." 89-1027 Pet. App. 26a.[10]

NW and Southern petitioned for rehearing and filed a suggestion of rehearing *en banc*. The petition and suggestion were denied by orders issued on September 29, 1989. 89-1027 Pet. App. 49a, 51a.[11]

On March 26, 1990, this Court granted the petition of Southern and NW for a writ of certiorari to the

[10] The Court of Appeals did not address objections ATDA had raised based on the Fifth Amendment and 45 U.S.C. § 152 Fourth.

[11] The ICC also filed a document styled as a petition for rehearing. The ICC, however, did not ask the Court of Appeals to rehear the case immediately but instead represented that it intended to conduct a proceeding on remand as directed by the court, and it asked the court "to refrain from ruling on this petition for rehearing until the Commission's decision on remand is published." ICC Petition for Rehearing at 2. By order entered on September 29, 1989, the Court of Appeals directed "that consideration of the aforesaid petition is deferred pending release of the ICC's decision on remand." 89-1027 Pet. App. 54a. Also by separate orders entered on the same date, the Court of Appeals entered its judgment of remand, 89-1027 Pet. App. 47a, and amended its July 25, 1989 decision to specify that it was remanding only the "records" and not the "cases" to the ICC. 89-1027 Pet. App. 27a-28a. The effect of that amendment, under the court's local rule 15(c), was to make clear that the court retained jurisdiction over the matter and that it would not be necessary for a party aggrieved by the ICC's eventual decision on remand to file a new petition for review. The ICC is now in the process of conducting its proceeding on remand.

District of Columbia Circuit Court of Appeals; and, on that date, the Court also granted the petition for a writ of certiorari of CSX Transportation, Inc. in the companion *CSX Transportation, Inc. v. Brotherhood of Railway Carmen, et al.*, and consolidated the two cases. J.A. 43.

SUMMARY OF ARGUMENT

This Court ruled in *Schwabacher v. United States*, 334 U.S. 182 (1948), that a railroad participating in a consolidation that has been approved by the Interstate Commerce Commission is, by operation of the exemption "from all other law" contained in 49 U.S.C. § 11341(a), exempt from claims based on the railroad's private contracts. The Court of Appeals, presented with the question whether § 11341(a) extends to claims asserted under labor agreements governed by the Railway Labor Act ("RLA"), held that the statutory exemption does not extend to claims based on contracts at all. That holding is plainly wrong under *Schwabacher*.

The Court of Appeals went farther and concluded that claims based on labor agreements, in particular, survive the § 11341(a) exemption, and that a railroad is not freed from such claims even if their recognition would prevent the railroad from carrying out the ICC-approved consolidation. The effect of the Court of Appeals' decision is to hand to labor unions the power of veto over the implementation of transactions found to be in the public interest. The right asserted under the labor agreements in question here is the right to bargain over changes in existing agreements in accordance with the procedures set forth in § 6 of the RLA, 45 U.S.C. § 156, before the approved consolidation may be carried out. Not only is exhaustion of the § 6 procedure "an almost interminable process," *Detroit & Toledo Shore Line R.R. v. United Transportation Union*, 396 U.S. 142, 155 (1969), but the whole point of the RLA is precisely *not* to force parties to agreement, *see Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711, 725 (1945). Permitting a labor union to assert claims based on its agreements would allow the union to thwart a consolidation's implementation simply by insisting on strict adherence to the agreements' terms and refusing to agree to any necessary changes. That result cannot survive *Schwabacher* and ignores decades of legislative, judicial, and administrative history establishing the reach of the § 11341(a) exemption.

The exemption provision now found in § 11341(a) dates back to the Transportation Act of 1920. Since then, Congress has on several occasions visited the question whether the carrying out of an ICC-approved transaction must yield to rights asserted by unions under their labor agreements with the merging railroads. For one three-year period, between 1933 and 1936, Congress expressly fashioned the law to accord unions the power to block transactions by standing on the terms of their existing agreements and their rights under the RLA.[12] But Congress has otherwise unswervingly denied this power to the unions.[13] Congress carefully studied the entire matter in passing the Transportation Act of 1940, when it explicitly

---

[12] Emergency Railroad Transportation Act of 1933, ch. 91, tit. I, § 10(a), 48 Stat. 211, 215.

[13] Compare, for example, § 10(a) of Title I of the Emergency Railroad Transportation Act with § 202 (15) of Title II of that statute, 48 Stat. 219.

rejected a proposal—known as the Harrington amendment—that would have restored a veto power to labor. *See Railway Labor Executives' Association v. United States*, 339 U.S. 142, 151 (1950). Reflecting this congressional action, the courts of appeals, until now, have uniformly concluded that the § 11341(a) exemption reaches all rights derived from the RLA, including the right to assert claims based on labor agreements.[14] Four Justices of this Court have already reached the same conclusion. *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 287 (1987) (Stevens, J., concurring). And the ICC has itself long shared the settled judicial understanding of the reach of the § 11341(a) exemption.

The Court of Appeals went out of its way to reject *sub silentio* the unequivocal legislative record and the decades of established case law and consistent administrative application. Giving force to the Court of Appeals' crabbed assessment of the scope of the § 11341(a) exemption would inevitably stymie transactions and thereby contradict the long-standing purpose of the Interstate Commerce Act to foster railroad consolidations in the interest of economy and efficiency. The decision of the Court of Appeals is unfounded and should be reversed.

---

[14] *E.g., Brotherhood of Locomotive Engineers v. Chicago & North Western Ry.*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963); *Brotherhood of Locomotive Engineers v. Boston & Maine Corp.*, 788 F.2d 794, 801 (1st Cir.), *cert. denied*, 479 U.S. 829 (1986); *Burlington Northern, Inc. v. American Railway Supervisors Association*, 503 F.2d 58, 62-63 (7th Cir. 1974) (per curiam), *cert. denied*, 421 U.S. 975 (1975); *Nemitz v. Norfolk & Western Ry.*, 436 F.2d 841, 845-46 (6th Cir.), *aff'd on other grounds*, 404 U.S. 37 (1971).

ARGUMENT

THE INTERSTATE COMMERCE ACT, 49 U.S.C. § 11341(a), EXEMPTS A RAILROAD CARRYING OUT AN ICC-APPROVED TRANSACTION FROM THE ASSERTION AGAINST IT OF RIGHTS CLAIMED UNDER LABOR AGREEMENTS ENFORCEABLE THROUGH THE RAILWAY LABOR ACT.

The Court of Appeals misconstrued the scope of the § 11341(a) exemption "from all other law," holding that the exemption does not extend to claims asserted under labor agreements governed by the Railway Labor Act. That holding conflicts with *Schwabacher v. United States*, 334 U.S. 182 (1948) ("*Schwabacher*"); it is at odds with the repeatedly expressed intent of Congress and fundamental national policy; and it is inconsistent with the decisions of all of the other circuit courts to have considered the issue and with longstanding administrative precedent.

The railroad industry has for many years been in a greater or lesser degree of economic disarray, characterized by increased competition from other transportation modes and declining traffic, revenues, and employment. Congress' response has been to adopt, and continually to recommit itself to, a national policy of fostering railroad consolidations, in the interest of economy and efficiency.[15] Section 11341(a), and its

---

[15] *E.g., United States v. Lowden*, 308 U.S. 225, 232 (1939) ("As a result of the enactment of the Transportation Act in 1920, consolidation of the railroads of the country, in the interest of economy and efficiency, became an established national policy"); *County of Marin v. United States*, 356 U.S. 412, 416, 417-18 (1958) (the Transportation Act of 1940 was designed "to facil-

predecessors, have been a cornerstone of this legislative design. *Schwabacher*, 334 U.S. at 190-97; *Seaboard Air Line R.R. v. Daniel*, 333 U.S. 118, 125 (1948).

The language of the exemption provision traces back seventy years to the Transportation Act of 1920. Section 407(8) of that Act provided that carriers affected by orders of the ICC approving consolidations:

> shall be, and they are hereby, relieved from the operation of the "antitrust laws," as designated in section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, and of all other restraints or prohibitions by law, State or Federal, in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section.

Transportation Act of 1920, ch. 91, § 407(8), 41 Stat. 456, 482, codified as 49 U.S.C. § 5(8) ("§ 5(8)").[16] The

itate merger and consolidation in the national transportation system" and "expresse[d] clearly the desire of Congress that the industry proceed toward an integrated national transportation system through substantial corporate simplification"); *Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Association*, 109 S. Ct. 2584, 2596-97 (1989) (the Railroad Revitalization and Regulatory Reform Act of 1976 and the Staggers Rail Act of 1980 were "aimed at reversing the rail industry's decline through deregulatory efforts, above all by streamlining procedures to effectuate economically efficient transactions").

[16] The complete text of the predecessors to § 11341(a) is reproduced at pages 118a-120a to the separately bound Appendix

exemption provision was reenacted in virtually identical terms in the Emergency Railroad Transportation Act of 1933;[17] and it was reenacted again in the Transportation Act of 1940, where it provided that

> any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved . . . .

Transportation Act of 1940, ch. 722, § 7(11), 54 Stat. 899, 908, codified as 49 U.S.C. § 5(11) ("§ 5(11)"). Finally, the exemption provision was recodified in 1978, without substantive change, as § 11341(a).[18]

In each version of the exemption provision, the operative language has been similar and the meaning has been constant: to effectuate the national transportation policy by immunizing carriers from collateral legal challenges to the carrying out of transactions approved by the ICC as in the public interest. The Court of Appeals' mistaken holding rejects the settled understanding of the effects of ICC

to the Petition For A Writ of Certiorari filed by CSX Transportation, Inc., in Case No. 89-1028.

[17] The text of the 1933 provision is found in note 30, below.

[18] Pub. L. No. 95-473, § 3(a), 92 Stat. 1337, 1466 (1978); *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 299 n.12 (Stevens, J., concurring).

approval and, to the extent it dictates adherence to the terms of existing labor agreements, threatens to prevent consolidations and thereby condemns the railroad industry to a destabilized future.

I. SECTION 11341(a) IS EFFECTIVE TO DISPLACE PRIVATE CONTRACTUAL OBLIGATIONS.

At the core of the Court of Appeals' conclusion that § 11341(a) does not apply to labor agreements is its erroneous holding that the exemption "from all other law" does not reach *contracts*. 89-1027 Pet. App. 12a, 18a.[19] The Court of Appeals' interpretation of § 11341(a) is foreclosed by this Court's decision in *Schwabacher*, which held that former § 5(11) of the Interstate Commerce Act, the direct predecessor of § 11341(a), relieved carriers from private contractual obligations, to the extent necessary to carry out an ICC-approved transaction. 334 U.S. at 185-89, 194-95, 199-201.

Schwabacher involved a challenge to an ICC order approving the merger of the Pere Marquette Railway Company with another carrier, brought by a group of dissenting Pere Marquette preferred stockholders. In the ICC approval proceeding, these stockholders claimed that under the Pere Marquette charter, which was enforceable under the laws of Michigan, they were entitled to receive at least $172.50 per share of stock; and they objected to the proposed merger plan because it allocated them substantially less than this amount and thereby deprived them "of contract rights under Michigan law. . . ." 334 U.S. at 188. The ICC

[19] No party to this case made such an argument and the Court of Appeals embraced it without benefit of briefing or oral argument on the point.

approved the proposed merger plan but left the stockholders to pursue in state court their claims for monies owed under the terms of the charter. *Id.*

This Court rejected the ICC's approach and, relying, *inter alia*, on § 5(11), held that once the ICC approved the merger, the surviving carrier was relieved from any claims for additional payments based on rights assertedly conferred by the Pere Marquette charter. 334 U.S. at 194-95; 201-02.

The Court of Appeals wrongly thought *Schwabacher* was concerned with the ICC's authority "to override state law," by which the court meant state statutory law, "granting dissenting shareholders [the] right to block [a] merger." 89-1027 Pet. App. 21a. This reading of *Schwabacher* is insupportable. Although *Schwabacher* contains many references to Michigan or state law, the decision does not involve any state statute conferring a substantive right on the preferred stockholders, let alone a right to block the merger.

The references to state law in *Schwabacher* relate to only two subjects: (1) the question whether, as a matter of Michigan law, the merger effected a "winding up" of Pere Marquette, as it was this event that would trigger rights under the express terms of the charter; and (2) the availability of the state court system to hear and decide the claims asserted by the stockholders under their private contract with the Pere Marquette. The sole source of the dissenting stockholders' claimed right to receive $172.50 per share was the promise made in the charter, and it was this contractual promise that, by operation of § 5(11), was abrogated.[20]

[20] This Court expressly recognized that "Michigan law pro-

All of this is evident from the face of the opinion in *Schwabacher*. But the point is buttressed by consideration of the underlying ICC decision approving the Pere Marquette merger and of the parties' presentation of the case in this Court. In its approval decision, the ICC had concluded that "[w]hether dissenting stockholders, as members of a class created by the merger, are entitled to better treatment under their charter contract with the Pere Marquette, is a question not within our province to decide." *Pere Marquette Railway Merger, Etc.*, 267 I.C.C. 207, 248 (1947) (citation omitted). In this Court, the ICC framed the question presented as:

> Whether, in passing upon the agreement of merger here involved, . . . the Commission was required, as a condition to its approval of the merger under the provisions of Section 5 (2-13), and Section 20a (1-11) of the Interstate Commerce Act, to adjudicate and enforce the claimed contractual rights, arising

vide[d] no specific right or procedure for appraisal and retirement of the holdings of a stockholder dissenting from a railroad merger." 334 U.S. at 185. The applicable Michigan merger statute merely ensured that the surviving company was required to honor the preexisting obligations of the merging companies: the "debts, liabilities and duties" of the merged companies "shall thenceforth attach to such new corporation, and be enforced against the same, to the same extent, and in the same manner, as if such debts, liabilities and duties had been originally incurred by it." Michigan Statutes Annotated, § 22.234, quoted in *Schwabacher*, Brief for Appellants at 9. When the *Schwabacher* Court spoke of state law imposing financial obligations on the surviving carrier, *e.g.*, 334 U.S. at 201, it was referring to the possibility that the Michigan courts might uphold the stockholders' claim under their contract.

> under State law, of dissenting stockholders as a separate and distinct class. . . .

Schwabacher, Brief for Appellee ICC at 2. The dissenting Pere Marquette shareholders agreed that the rights they sought to have the ICC enforce were contractual in nature.[21]

This Court concluded that neither party's view of the working of the statutory scheme was correct. 334 U.S. at 189-90. Instead, the Court held that the ICC had exclusive authority to determine the rights of stockholders notwithstanding the provisions of their private contract with the corporation, and that the ICC's approval of the merger supplanted the state court remedies that otherwise would have been available to those stockholders to vindicate their putative right to $172.50 per share under the letter of the contract.[22]

---

[21] See *Schwabacher*, Brief for Appellants at 2; *Schwabacher*, Reply Brief for Appellants at 2 ("Appellants have stated the question here as whether the Commission unlawfully declined to take jurisdiction (question presented, brief 2). The Commission states the question similarly, as whether it was required 'to adjudicate and enforce the claimed contractual rights * * * of dissenting stockholders.' " (footnote omitted)).

[22] *Schwabacher* also establishes that in approving a merger the ICC is required by 49 U.S.C. §§ 5(2)(b) and 20a (now 49 U.S.C. §§ 11344(a), (c) and 11301) to find that the merger terms are just and reasonable to stockholders, as measured by the fair economic value of their stock. 334 U.S. at 198-99. There would be no warrant for reading *Schwabacher* as encompassing only the operation of the ICC's approval authority, not its exemption authority, and *Schwabacher* has not been read that way. To the contrary, four Justices of this Court have understood *Schwabacher* to be construing the § 5(11) (now § 11341(a)) exemption, *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. at 298-

Our understanding of *Schwabacher* is not new. The Court of Appeals itself has previously agreed with it. *Altman v. Central of Georgia Ry.*, 488 F.2d 1302 (D.C. Cir. 1973) (claims for payment of dividends allegedly due under the terms of a railroad's charter and bylaws are barred). *See also Snow v. Dixon*, 362 N.E.2d 1052 (Ill.), *cert. denied*, 434 U.S. 939 (1977); *St. Louis Southwestern Ry. v. City of Tyler*, 422 S.W.2d 780 (Tex. Civ. App. 1967). And since *Schwabacher*, the ICC has routinely asserted its authority, under the exemption provision, to override contractual obligations.[23]

99 (Stevens, J., concurring), as have the lower federal courts, *e.g.*, *Deutsch v. Flannery*, 883 F.2d 60, 62-63 (9th Cir. 1989), the state courts, *e.g.*, *Bruno v. Western Pacific R.R.*, 498 A.2d 171, 174 (Del. Ch. 1985), *aff'd*, 508 A.2d 72 (Del. 1986), *cert. denied*, 482 U.S. 927 (1987), and the ICC, *e.g.*, *St. Louis Southwestern Ry. Lease*, 290 I.C.C. 205, 212-13 (1953). No other reading of *Schwabacher* is possible, for this Court was there plainly ruling on the effect that, by operation of § 5(11), the approval of the Pere Marquette merger carried with it: the extinguishing of the stockholders' right to pursue their contract claim.

[23] *E.g.*, *Missouri Pacific R.R.—Merger—Texas & Pacific Ry.*, 348 I.C.C. 414, 430 (1976), *rev'd on other grounds sub nom. City of Palestine v. United States*, 559 F.2d 408 (5th Cir. 1977) (assuming *arguendo* that ICC has authority to abrogate contracts, but concluding that ICC's exercise of this power in the circumstances was incorrect), *cert. denied*, 435 U.S. 950 (1978); *Southern Pacific Co. Merger, Etc., Texas & New Orleans R.R.*, 312 I.C.C. 598, 602 (1961); *St. Louis Southwestern Ry. Lease*, 290 I.C.C. 205, 211-13 (1953).

The Court of Appeals incorrectly suggested, 89-1027 Pet. App. 13a, that in *Gulf, Mobile & Ohio R.R.—Abandonment*, 282 I.C.C. 311 (1952), the ICC disclaimed authority, under 49 U.S.C. § 5(11), to abrogate contracts. The decision was precisely to the contrary. *Gulf, Mobile* was an abandonment case; § 5(11) (like

The Court of Appeals was content to leave transactions that have been approved as in the public interest under 49 U.S.C. §§ 11343-44 vulnerable to defeat through claims asserted under private contracts because it did not think that the phrase "all other law" encompassed "contracts." 89-1027 Pet. App. 12a, 18a.[24] Precedent aside, even considered as

today's § 11341(a)) applied to mergers and consolidations, not abandonments. The ICC held, in *Gulf, Mobile*, that it could not abrogate contracts in abandonment cases because it could do so "only upon a clear grant of statutory authority similar to that contained in section 5(11)." 282 I.C.C. at 335. Moreover, the ICC subsequently determined that private contracts could not stand in the way of its authority to approve abandonments. *E.g.*, *Fort Dodge, Des Moines & Southern Ry. Abandonment*, 312 I.C.C. 708, 710-11 (1961) ("The existence of a private contract for continued service between a carrier and a shipper is not sufficient to prevent abandonment of the line, if the facts so warrant. The power of Congress over interstate commerce is unrestricted by the obligations of private contracts and our decision may not be affected thereby."); *see also Missouri Pacific R.R.—Abandonment Exemption—In Marion County, IL*, Docket No. AB-3 (Sub-No. 77X), decision served November 10, 1988.

[24] The Court of Appeals expressed concern that if the law were otherwise, the ICC "could set to naught, in order to facilitate a merger, a carrier's solemn undertaking, in a bond indenture or a bank loan, to refrain from entering into any such transaction without the consent of its creditors," 89-1027 Pet. App. 13a. In fact, there has been no doubt since *Schwabacher* that the ICC does have precisely that power, within the other confines of § 11341(a). Indeed, the main difference between the "solemn undertaking" hypothesized by the Court of Appeals and the "solemn undertaking" embodied in the Pere Marquette charter at issue in *Schwabacher* is that, of the two, the latter posed the *lesser* threat to the carrying out of an approved transaction. As the Court acknowledged in *Schwabacher*, the ICC had there found that even if the dissenting Pere Marquette stockholders' contractual claims were sustained by the Michigan

an original matter there is nothing to be said for that conclusion; it artificially restricts the operative statutory language and runs counter to the goals the exemption has always sought to promote.[25] But this

courts, the amount involved would "not impair the carrier's ability to perform its services" after the merger, 334 U.S. at 197—a fact that the dissenting Justices thought sufficient to preclude the application of § 5(11), 334 U.S. at 207 (Frankfurter, J., dissenting), but that the Court did not.

[25] The Court of Appeals, loosing the phrase "all other law" as it now appears in § 11341(a) from its textual source, took the statutory language to comprehend only "positive enactments," 89-1027 Pet. App. 18a, and chastised the ICC for seeing in it a broader reference to " 'all legal obstacles.' " 89-1027 Pet. App. 13a. The Court of Appeals apparently forgot that the immediate predecessor to § 11341(a), the former § 5(11), exempted carriers "from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal." This language is traceable directly to the original 1920 provision (the former § 5(8)) and removes any doubt that the exemption encompasses not merely positive enactments but *all* restraints, limitations, and prohibitions of law—all "legal obstacles" to the carrying out of a transaction. The 1978 recodification of § 5(11) as § 11341(a) did not effect any substantive change in the exemption provision.

Further, even considered on its own, the phrase "all other law" plainly is broad enough to encompass claims founded on a private contract. The common law, no less than statutory law, is "law" within the ordinary meaning of the term. *E.g.*, *Illinois v. City of Milwaukee*, 406 U.S. 91, 99-101 (1972) ("we see no reason not to give 'laws' its natural meaning . . . and therefore conclude that [28 U.S.C.] § 1331 jurisdiction will support claims founded upon federal common law as well as those of a statutory origin"); *Warren v. United States*, 340 U.S. 523, 526 (1951) (the "term law in our jurisprudence usually includes the rules of court decisions as well as legislative acts"); *Erie R.R. v. Tompkins*, 304 U.S. 64, 78-79 (1938). It is precisely because contracts create obligations that are legally enforceable that contracts could, if

is not an original matter. It has been understood for forty-two years that private contractual claims are barred by the statutory exemption as authoritatively interpreted by this Court in *Schwabacher*.

II. SECTION 11341(a) IS EFFECTIVE TO DISPLACE RIGHTS DERIVED FROM THE RAILWAY LABOR ACT.

A. Seven Decades Of Legislative, Judicial, And Administrative History Establish That § 11341(a) Displaces RLA-Derived Rights.

The § 11341(a) exemption "from all other law" indisputably extends to collective bargaining agreements existing under the Railway Labor Act. Because, as *Schwabacher* holds, the statutory exemption applies to purely private contracts, it certainly applies to contracts, like those in question here, that are themselves constructs of federal statutory law.

The Court of Appeals likened railroad labor agreements to contracts governed by "common law rules of liability," 89-1027 Pet. App. 18a, and went on from there to attempt to drive a wedge between the "override" of such labor agreements and the "override" of the RLA. This was simply wrong. Railroad labor

allowed, interfere with the carrying out of an approved transaction.

Moreover, the Court of Appeals' conclusion that the exemption covers only "positive enactments" is inherently implausible. Under that interpretation, a railroad's attempt to carry out a transaction, though exempt from suit under the antitrust statutes, would remain subject to attack under myriad state common law rules respecting unfair competition or unreasonable restraints of trade. It is unthinkable that Congress left such a gaping hole in its effort to ensure "the maintenance of an adequate rail transportation system," *United States v. Lowden*, 308 U.S. 225, 230 (1939).

agreements are not governed by the common law. Collective bargaining agreements in the railroad industry are creatures of the RLA and have no meaning apart from the rights and obligations that statute bestows; the RLA prescribes the procedures for creating agreements and the exclusive means of enforcing them. *Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320 (1972) (railroad labor agreements are not enforceable in state court); *Detroit & Toledo Shore Line R.R. v. United Transportation Union*, 396 U.S. at 156 (RLA, 45 U.S.C. § 152 Seventh, "operates to give legal and binding effect to collective agreements").[26] The dichotomy the Court of Appeals sought to create between railroad labor agreements and the federal statute obligating adherence to their terms has not been recognized and is not valid. A well-elaborated legislative and judicial history definitively establishes that the question whether the exemption provision applies to labor agreements is inextricably linked with the question whether it applies to the RLA. And it is established that § 11341(a) is effective to override both the agreements and the statute.

That conclusion will come as no surprise to this Court; four Justices have already expressly reached it. Justices Stevens, Brennan, Marshall, and Blackmun, concurring in the judgment in *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 287 (1987) (Stevens, J., concurring) ("*ICC v. BLE*"), have agreed that § 11341(a) is effective to displace the RLA

[26] *See also Chicago & North Western Ry. v. United Transportation Union*, 402 U.S. 570, 576-78 (1971) (obligation to "maintain" agreements is founded on RLA); *California v. Taylor*, 353 U.S. 553, 561 (1957) (railroad labor agreements supersede state law).

and that the power to modify or override labor agreements is encompassed in the § 11341(a) exemption. In *ICC v. BLE*, as here, what was at stake was precisely the claim of certain railroad employees that the "Railway Labor Act . . . and their collective bargaining agreements" gave them the right to perform certain work. 482 U.S. at 295 (Stevens, J., concurring). The concurring Justices would have rejected that claim because of the § 11341(a) exemption, explaining:

> [Section] 11341 automatically exempts a person from "other laws" whenever an exemption is "necessary to let that person carry out the transaction. . . ." 49 U.S.C. § 11341. The breadth of the exemption is defined by the scope of the approved transaction, and no explicit announcement of exemption is required to make the statute applicable.

482 U.S. at 298 (citing *Schwabacher*; footnote omitted).[27]

[27] In *ICC v. BLE*, a majority of a panel of the District of Columbia Circuit had remanded the case to the ICC, directing the agency to make specific findings as to the necessity of an override of RLA-derived rights, including rights assertedly based on labor agreements, in the particular case. *Brotherhood of Locomotive Engineers v. ICC*, 761 F.2d 714 (D.C. Cir. 1985). This Court vacated the Court of Appeals' decision on the ground that the appeal of the ICC decision had been untimely and that the Court of Appeals accordingly lacked jurisdiction. The four concurring Justices would have reached the merits of the case and concluded that the § 11341(a) exemption is self-executing and therefore does not require specific findings as to the necessity of an override of RLA rights, including rights claimed to arise under labor contracts. 482 U.S. at 298.

The conclusion reached by the four concurring Justices in *ICC v. BLE* is exactly the one contemplated by the Court in *United States v. Lowden*, 308 U.S. 225 (1939) ("*Lowden*"). *Lowden* upheld the ICC's authority to impose labor protection when approving a railroad consolidation, prior to enactment of the first statutory requirement for such protection. As the *Lowden* Court explained, protective arrangements were appropriate in significant part because railroad consolidations necessarily result in the abridgment of rights previously held under existing labor agreements:

> [T]he Commission has estimated in its report on the unification of the railroads that 75% of the savings will be at the expense of railroad labor. Not only must unification result in wholesale dismissals and extensive transfers, involving expense to transferred employees, but in the loss of seniority rights which, by common practice of the railroads are restricted in their operation to those members of groups who are employed at specified points or divisions. It is thus apparent that the steps involved in carrying out the Congressional policy of railroad consolidation in such manner as to secure the desired economy and efficiency will unavoidably subject railroad labor relations to serious stress and its harsh consequences may so seriously affect employee morale as to require their mitigation. . . .

308 U.S. at 233. These inevitable effects on employees justified the imposition of compensatory labor protection as "an essential aid to the maintenance of a

service uninterrupted by labor disputes." *Id.* at 235-36.

The application of § 11341(a) to all RLA-derived rights is precisely what Congress intended. The legislative record makes it clear that Congress has always understood that the Interstate Commerce Act's exemption provision will cause both the RLA and agreements negotiated under that statute to yield to the carrying out of an approved transaction.

Congress' purpose is revealed dramatically and unequivocally in the Emergency Railroad Transportation Act of 1933 ("ERTA"). Title I of ERTA was *temporary* legislation, ultimately of three years duration, that responded to the extraordinary circumstances created by the Depression. *See generally St. Joe Paper Co. v. Atlantic Coast Line R.R.*, 347 U.S. 298, 317 (1954).[28] Section 10(a) of ERTA Title I contained an exemption from "restraints or prohibitions by law, State or Federal," similar to that found in the Transportation Act of 1920 (then 49 U.S.C. § 5(8)), to which Congress added the limitation that

> nothing herein shall be construed to repeal, amend, suspend, or modify any of the requirements of the Railway Labor Act or the duties and obligations imposed thereunder or through contracts entered into in accordance with the provisions of said Act.

---

[28] Originally enacted for one year, Title I was extended for an additional year by Presidential proclamation, Proclamation No. 2082 (May 2, 1934), and for a third year by Congress, S.J. Res. 112, 74th Cong., 1st Sess., 79 Cong. Rec. 9346 (1935).

48 Stat. at 215.[29] Quite plainly, there would have been no need for this specific limitation if the exemption provision, by its terms, did not reach the RLA and labor agreements in the first place.

At the same time, Congress did *not* carve out a special exception for the RLA or labor agreements from the exemption from "all other restraints or prohibitions by or imposed under authority of law, State or Federal," contained in § 202(15) of the *permanent* Title II of ERTA, which was an amendment to the Interstate Commerce Act. That provision was substantially identical to the exemption provision found in the 1920 Act.[30] It is this unqualified exemption

---

[29] Title I of ERTA established a federal railroad coordinator to encourage carriers to eliminate unnecessary expenses and duplication of services. S. Rep. No. 87, 73rd Cong., 1st Sess. 1 (1933). The restrictive proviso quoted in text was the last part of Section 10(a) of ERTA Title I, which otherwise provided:

> The carriers or subsidiaries subject to the Interstate Commerce Act, as amended, affected by any order of the Coordinator or Commission made pursuant to this title shall, so long as such order is in effect, be, and they are hereby, relieved from the operation of the antitrust laws, as designated in section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, and of all other restraints or prohibitions by law, State or Federal, other than such as are for the protection of the public health or safety, in so far as may be necessary to enable them to do anything authorized or required by such order made pursuant to this title: *Provided, however*, That nothing. . . .

[30] Section 202(15) of ERTA Title II provided:

> The carriers and any corporation affected by any order made under the foregoing provisions shall be, and they are hereby, relieved from the operation of the "antitrust laws," as designated in section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, and of all other restraints or prohibitions by or imposed under authority of law, State or Federal, insofar as may be necessary to enable them to do anything authorized or required by such order.

Emergency Railroad Transportation Act, ch. 91, tit. II, § 202(15), 48 Stat. 211, 219, codified as 49 U.S.C. § 5(15) ("§ 5(15)").

provision, codified as 49 U.S.C. § 5(15), that was a forerunner of § 11341(a). This Court has previously recognized, in construing the reach of the exemption provision, that differences between Title I and Title II of ERTA "indicate an intentional distinction." *Texas v. United States*, 292 U.S. 522, 534 (1934) (contrasting the all-encompassing exemption contained in § 202(15) of Title II with a provision in Title I expressly guaranteeing that carriers would not be relieved from contractual agreements to keep offices in particular locations).

Congress reaffirmed its purpose in the Transportation Act of 1940, in two principal ways. First, Congress reenacted (as 49 U.S.C. § 5(11)) the broad exemption from "the operation . . . of all . . . restraints, limitations, and prohibitions of law, Federal, State, or municipal . . . ," without any exception for the RLA or labor agreements.[31] This provision was

---

[31] The 1940 Act also provided "additional proof," if any were needed, of Congress' intent to grant the ICC an adequate exemption power, by making the ICC's jurisdiction over transactions "exclusive and plenary." *Seaboard Airline R.R. v. Daniel*,

later recodified as § 11341(a), without substantive change.

Second, Congress, in enacting the predecessor to 49 U.S.C. § 11347, which placed a statutory foundation under labor protection, rejected a proposal known as the Harrington amendment. Under the Harrington amendment, consolidations would have been permitted to occur only if all rights under the RLA and labor agreements were preserved, and no jobs were lost; the amendment proposed to bar the ICC from approving any transaction that would "result in unemployment or displacement of employees of the carrier or carriers, *or in the impairment of existing employment rights* of said employees." 84 Cong. Rec. 9882 (1939) (emphasis added). The Harrington amendment essentially sought to return to the situation that had existed under the temporary ERTA Title I. Before it expired, Title I of ERTA had both placed the RLA and labor agreements outside the scope of its exemption provision and also provided for a job freeze;[32] the Harrington amendment echoed those provisions. *See Brotherhood of Maintenance of Way Employes v. United States*, 366 U.S. 169, 173-76 (1961); *Railway Labor Executives' Association v. United States*, 339 U.S. at 150 & n.13.

Congress rejected the Harrington amendment, just as it earlier had chosen not to enact the ERTA Title

333 U.S. 118, 125 (1948).

In addition, the 1940 Act relieved the ICC of the responsibility it had under the 1920 Act to promulgate a national consolidation plan, and instead left "the power to initiate mergers and consolidations . . . completely in the hands of the carriers." *St. Joe Paper Co. v. Atlantic Coast Line R.R.*, 347 U.S. at 319.

[32] ERTA, ch. 91, tit. I, § 7(b), 48 Stat. 211, 214.

I restrictions as permanent legislation. Instead, Congress enacted what became 49 U.S.C. § 5(2)(f), the predecessor to § 11347, requiring the ICC, in approving a transaction, to provide a "fair and equitable arrangement to protect the interests of the [affected] employees." The Harrington amendment had

> introduced a new problem. Until it appeared, there had been substantial agreement on the need for consolidations, together with a recognition that employees could and should be fairly and equitably protected. This amendment, however, threatened to prevent all consolidations to which it related.

Railway Labor Executives' Association v. United States, 339 U.S. at 151. The defeat of the Harrington amendment confirmed Congress' intent to permit railroads to carry out approved transactions that cause changes in existing labor agreements, but to ensure that affected employees receive fair compensation under the ICC's protective conditions. *See id.* at 147-54; *Norfolk & Western Ry. v. Nemitz*, 404 U.S. 37, 42 (1971).

The Court of Appeals missed all of this and instead narrowly directed most of its inquiry to the legislative history of the Transportation Act of 1920, 89-1027 Pet. App. 17a-18a, while professing itself unable to find any later suggestion that Congress meant to bring collective bargaining agreements "within the reach of the statute," 89-1027 Pet. App. 19a. The Court of Appeals not only misread the history of the 1920 Act,[33] but was obviously wrong in proceeding as

[33] It is evident, as the Court of Appeals noted (89-1027 Pet.

though § 11341(a)—which has been reenacted several times over the past seventy years—is effectively cab-

App. 14a-17a), that when Congress enacted the exemption provision in 1920 (then codified as 49 U.S.C. § 5(8)), it did so to relieve consolidating carriers from the restraints of the federal antitrust laws and of state corporation and transportation statutes. But it is equally evident that had Congress meant the exemption to apply only to those particular statutes, it would not have enacted the provision it did, which broadly encompassed "*all* other restraints or prohibitions by law, State or *Federal*," 41 Stat. 482 (emphasis added). *See Texas v. United States*, 292 U.S. 522, 534-35 (1934); *see generally Jefferson County Pharmaceutical Association v. Abbott Laboratories*, 460 U.S. 150, 159 n.18 (1983) (the absence of a specific "congressional focus is immaterial where the plain language applies"); *United States v. Bornstein*, 423 U.S. 303, 309-10 (1976) (same).

The Court of Appeals also observed that Title III of the 1920 Act, ch. 91, 41 Stat. 456, 469, created a framework for the regulation of collective bargaining in the railroad industry, and suggested that it found nothing in the Act's legislative history to indicate that the exemption provision applied to Title III. 89-1027 Pet. App. 18a, 23a. But the Court of Appeals has the analysis backwards. The exemption provision, by its clear terms, covered all restraints of federal law, and Title III was indisputably a federal law. That the exemption provision did not expressly refer to Title III does not demonstrate ambiguity, but breadth. *See generally United States v. Monsanto*, 109 S. Ct. 2657, 2663 (1989) ("Congress' failure to supplement [21 U.S.C.] § 853(a)'s comprehensive phrase—'*any* property'—with an exclamatory 'and we even mean assets to be used to pay an attorney' does not lessen the force of the statute's plain language"; emphasis in original). There is no basis—and certainly no need—for looking beyond a statutory provision that is plain on its face to see if Congress happened to repeat in the legislative history what it unambiguously enacted as the law. If anything, the presence of Title III in the 1920 Act simply shows that the Congress that enacted the exemption provision unquestionably knew that the body of federal law included a statute governing relations

ined by the particular circumstances that Congress confronted in 1920, *see McLean Trucking Co. v. United States*, 321 U.S. 67, 78-79 (1944) (expansive language of § 5(11) refutes contention that because motor carriers faced less severe economic circumstances in 1935 than did railroads in 1920, scope of § 5(11) is narrower for motor carriers than for railroads); *Deutsch v. Flannery*, 883 F.2d 60, 62-63 (9th Cir. 1989) (§ 11341(a) bars claims under Securities Exchange Act of 1934). *See generally Ngiraingas v. Sanchez*, 58 U.S.L.W. 4504, 4506 (U.S. April 24, 1990) (No. 88-1281) ("successive enactments" of statute, "in context," indicate congressional intent).[34]

between labor and management in the railroad industry. The significance of the legislative history of the 1920 Act in this respect is that it does *not* reveal any congressional intent to remove Title III from the coverage of the broad language of what became § 5(8). *See generally Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. 102, 108 (1980) (absent a clearly expressed legislative intention to the contrary, language of the statute must be regarded as conclusive).

Moreover, contrary to the Court of Appeals' apparent belief (89-1027 Pet. App. 18a, 23a), there is obviously no inconsistency in Congress' having enacted Title III and simultaneously made it subject to the exemption provision. Title III created a Railroad Labor Board as a means for the peaceful settlement of labor controversies between carriers and their employees. *See Pennsylvania R.R. v. United States Railroad Labor Board*, 261 U.S. 72, 79 (1923). The functions of the Labor Board were *not* tied to the ICC's authority over transactions; rather, they covered ordinary day-to-day relations between labor and management. The Labor Board, whose decisions were not supported by legal sanction in any event, *id.* at 79-80, was empowered to carry out its assigned functions except when to do so would conflict with the carrying out of a railroad consolidation subject to § 5(8).

[34] The Court of Appeals also looked to the legislative history

In accordance with the dispositive legislative history, the courts of appeals, beginning with *Brotherhood of Locomotive Engineers v. Chicago & North Western Ry.*, 314 F.2d 424 (8th Cir. 1963), *aff'g* 202 F. Supp. 277 (S.D. Iowa 1962), *cert. denied*, 375 U.S. 819 (1963) ("*BLE v. C&NW*"), have, until now, uniformly concluded that the exemption provision now found in § 11341(a) reaches all rights derived from the RLA.

---

of the Railway Labor Act of 1926, but it misunderstood that history as well. The court mistakenly relied on Congress' rejection, in 1926, of a proposed amendment to the bill that became the RLA that would have permitted the ICC to suspend wage agreements it believed were not in the public interest.

The Court of Appeals purported to find in language quoted from a 1926 Senate Report—" 'there was a fundamental objection to making changes of a substantive nature in the agreement which the parties had reached' "—specific evidence of congressional hostility to ICC interference with negotiated wage agreements. 89-1027 Pet. App. 18a. But the quoted passage in fact did not address this subject at all. The "agreement" to which the Senate Report referred was not a negotiated wage agreement (or such agreements in general), but, rather, the overall agreement between management and labor *as to what the RLA as a whole should say*. The quoted passage simply affirmed that the new RLA should ratify, and not change the terms of, the national legislative compact between management and labor. S. Rep. No. 606, 69th Cong., 1st Sess. 6 (1926), *reprinted in* 1 *Railway Labor Act of 1926, Legislative History* at 100, 105 (M. Campbell & E. Brewer, III, eds. 1988). *See generally International Association of Machinists v. Street*, 367 U.S. 740, 758 (1961).

What the Senate Report actually said about the proposed amendment to the RLA bill was that it would embroil the ICC in a "field of controversy" and thereby impair the ICC's effectiveness. S. Rep. No. 606, at 6, *reprinted in* 1 *Railway Labor Act of 1926, Legislative History* at 105. In any event, the proposed amendment was *not* related to the ICC's jurisdiction over transactions, but would have given the ICC a roving commission to suspend wage agreements generally. The amendment's rejection provides no evidence that Congress intended (either prior to or after 1926) to exclude the RLA, and labor agreements enforceable under it, from the reach of the exemption provision.

In *BLE v. C&NW*, the Eighth Circuit held that former § 5(11) exempted a railroad carrying out an ICC-approved transaction from the assertion against it of rights claimed under the RLA, including rights based on collective bargaining agreements. 314 F.2d at 426, 431-33. In that case, the union had argued that § 5(11) "only purports to relieve the railroad of 'restraints' or 'limitations' or 'prohibitions' of law and does not purport to relieve the railroad of its contractual obligations"—there, the railroad's asserted obligation to respect seniority rights arising by virtue of certain labor contracts. 202 F. Supp. at 283. The district court, citing *Schwabacher*, rejected the union's arguments. 202 F. Supp. at 284. The Eighth Circuit, though not mentioning *Schwabacher* explicitly, affirmed the district court in all respects, explaining that to hold otherwise "would be to disregard the plain language of § 5(11) conferring exclusive and plenary jurisdiction upon the ICC to approve mergers and relieving the carrier from all other restraints of federal law." 314 F.2d at 431-32. The Eighth Circuit further reasoned that excluding RLA-derived rights from the reach of the § 11341(a) exemption would "threaten to prevent many consolidations," 314 F.2d at 431, and thereby produce the very result that Congress had repudiated in 1940 by rejecting the Harrington amendment, *id.* at 430-31. *Accord Missouri Pacific R.R. v. United Transportation Union*, 782

F.2d 107, 111-12 (8th Cir. 1986), *cert. denied*, 482 U.S. 927 (1987).[35]

All the other circuits to have considered the issue have followed *BLE v. C&NW* in similarly concluding that rights asserted under the RLA are subordinate to the Interstate Commerce Act's exemptive provision. *Brotherhood of Locomotive Engineers v. Boston & Maine Corp.*, 788 F.2d 794, 801 (1st Cir.), *cert. denied*, 479 U.S. 829 (1986); *Burlington Northern, Inc. v. American Railway Supervisors Association*, 503 F.2d 58, 62-63 (7th Cir. 1974) (per curiam), *cert. denied*, 421 U.S. 975 (1975); *Nemitz v. Norfolk & Western Ry.*, 436 F.2d 841, 845-46 (6th Cir.), *aff'd on other grounds*, 404 U.S. 37 (1971). In so deciding, none of these courts distinguished between rights claimed under the RLA and those claimed under labor agreements enforceable through that statute. To the contrary, these courts, like the four concurring Justices in *ICC v. BLE*, all treated these RLA-derived rights as of a piece, never doubting that the exemption "from all other law" immunizes a railroad against all RLA-based challenges to the carrying out of an ICC-approved transaction.[36]

---

[35] In a somewhat different context, the Eighth Circuit, without reference to its own prior decisions and without any independent analysis, has subsequently favorably cited the conclusion of the Court of Appeals that the ICC purportedly lacks the power to override the provisions of a labor agreement. *Brotherhood of Locomotive Engineers v. ICC*, 885 F.2d 446, 449-50 (8th Cir. 1989).

[36] The circuit courts have reached similar results in cases arising in the airline industry, which is subject to the RLA, even though the statutory scheme governing consolidations in that industry did not contain an exemption provision comparable to

This same understanding of the reach of the § 11341(a) exemption has been a pillar of ICC regulation for many years. The ICC explicitly stated as long ago as 1974 that the exemption provision is effective to displace RLA-derived rights:

> . . . RLEA's assertion that the [NW merger protective] agreement and the wages, rules, and working conditions governed by the Railway Labor Act may not be changed except in accordance with the procedures prescribed by that act is squarely refuted by the language of section 5(11) of the Interstate Commerce Act which confers exclusive and plenary jurisdiction upon this Commission to approve mergers and relieve carriers from all other restraints of Federal law. The Railway Labor Act is a Federal act and is thereby preempted by section 5(11). Thus the Commission may relieve the railroad from the requirements of that act insofar as is necessary to carry into effect the transaction approved pursuant to section 5(2).

---

§ 11341(a). Every court to consider the question held that the RLA, and labor agreements entered into under it, must yield to the Civil Aeronautics Board's authorization of a transaction, subject to employee protective conditions. *International Association of Machinists v. Northeast Airlines, Inc.*, 536 F.2d 975, 977 (1st Cir), *cert. denied*, 429 U.S. 961 (1976); *International Association of Machinists v. Northeast Airlines, Inc.*, 473 F.2d 549, 559-60 (1st Cir.), *cert. denied*, 409 U.S. 845 (1972); *American Airlines, Inc. v. CAB*, 445 F.2d 891, 896-97 (2d Cir. 1971), *cert. denied*, 404 U.S. 1015 (1972); *Kent v. CAB*, 204 F.2d 263, 266 (2d Cir.) ("[a] private [labor] contract must yield to the paramount power of the [CAB] to perform its duties under the statute creating it to approve mergers"), *cert. denied*, 346 U.S. 826 (1953).

Norfolk & Western Ry. and New York, Chicago & St. Louis R.R.—Merger, Etc., 347 I.C.C. 506, 511-12 (1974). When called upon to do so, the ICC elaborated upon the basis for its position, reiterating its view that § 11341(a) encompasses rights claimed under labor agreements. *E.g.*, *Denver & Rio Grande Western R.R.—Trackage Rights—Missouri Pacific R.R.*, Finance Docket No. 30,000 (Sub-No. 18), decision served October 25, 1983, slip op. at 6 ("[t]o the extent that existing working conditions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give way to the implementation of the transaction") ("*DRGW*"), *appeal dismissed sub nom. ICC v. BLE*, 482 U.S. 270 (1987). The interpretation of § 11341(a) adhered to by the ICC in our case is fully in accord with the ICC's established jurisprudence;[37] that statutory interpretation is not only permissible, but clearly correct. It is entitled to deference. *Chevron U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

[37] The Court of Appeals' decision to remand the question whether § 11341(a) extends to rights asserted under the RLA for further explanation is premised on a misreading of the ICC's precedents and invokes no sound principle of administrative law. The Court of Appeals mistakenly thought (89-1027 Pet. App. 22a) that the ICC first took the position that § 11341(a) applies to the RLA in 1983, in *DRGW*, and that this position deviated without explanation from a position the ICC had adopted in 1967 in *Southern Ry.—Control—Central of Georgia Ry.*, 331 I.C.C. 151 (1967) ("*Southern Control*"). But neither point is true. As we have just shown, the ICC had expressly said *in 1974* that § 11341(a) overrides RLA-derived rights. *Norfolk & Western Ry.and New York, Chicago & St. Louis R.R.—Merger, Etc.*, 347 I.C.C. 506, 511-12 (1974). Moreover, the Court of Appeals' reading of *Southern Control* ignores that the whole point of that decision was to make clear that employees could *not* invoke RLA rights in connection with the carrying out of an approved transaction. 331 I.C.C. at 162-64, 171. Indeed, the ICC observed that, if not displaced, the RLA "would seriously impede mergers." *Id.* at 171.

The restrictive reading of § 11341(a) adopted by the Court of Appeals defies history, decades of clear legislative intent, and the previously uniform understanding of the courts and the ICC; its application would defeat the purpose that the exemption provision is intended to serve. The scope of the § 11341(a) exemption must be measured by Congress' aim of promoting economy and efficiency in interstate transportation. *Texas v. United States*, 292 U.S. at 534-35. *See Escanaba & Lake Superior R.R. v. United States*, 303 U.S. 315, 320 (1938) (provisions in Transportation Act of 1920 governing consolidations "are to be given liberal construction in aid of the purposes Congress had in mind"). There can be no doubt that a requirement of unquestioned adherence to existing labor agreements—or a requirement that approved transactions not be implemented until the RLA § 6 procedures for the negotiation of changes in existing agreements have been exhausted—would stifle the

Following the decision of the Court of Appeals, the ICC initially professed to accept the court's instruction that the § 11341(a) exemption does not reach labor agreements. *Brandywine Valley R.R.—Purchase—CSX Transportation, Inc.*, 5 I.C.C.2d 764, 772 n.5 (1989), *appeal docketed*, No. 89-1503 (D.C. Cir. Aug. 21, 1989). Because the Court of Appeals was wrong, the ICC's initial acquiescence in the court's holding has no force. Moreover, in subsequent administrative proceedings in which no formal decisions have yet been rendered, the ICC has apparently receded from its initial position in *Brandywine*.

continuing implementation of already-approved railroad consolidations and the undertaking of new ones.

Indeed, under the Court of Appeals' decision, labor unions would effectively be given the right to exercise the power of veto over the carrying out of transactions the ICC has approved as in the public interest. That the Court of Appeals understood it was extending this power to unions is demonstrated by the Court's own laconic suggestion that NW and Southern might now simply prefer to undo the transfer of power distribution work at issue here in light of the court's holding that § 11341(a) is not effective to "set aside" any agreements that " 'would have prevented the consolidation from going forward.' " 89-1027 Pet. App. 25a.

Other courts of appeals and the ICC have long recognized that unless a railroad seeking to carry out an approved transaction is exempt from the assertion against it of rights claimed under the RLA, achievement of the national purpose of facilitating consolidations would be frustrated. Obviously, if an existing collective bargaining agreement contains terms that restrict a consolidation of work that implements an approved transaction, strict compliance with those terms will impede (if not thwart entirely) the carrying out of the transaction.

Resort to the RLA § 6 process for changing agreements would not provide an answer. The RLA's procedures are "purposely long and drawn out," *Brotherhood of Railway & Steamship Clerks v. Florida East Coast Ry.*, 384 U.S. 238, 246 (1966), and exhaustion of them is "an almost interminable process," *Detroit & Toledo Shore Line R.R. v. United Transportation Union*, 396 U.S. at 155. Moreover,

the point of the RLA is precisely *not* to force parties to agreement. Under the RLA, unless both parties voluntarily agree to arbitration, "no authority is empowered to decide the dispute." *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. at 725.[38] Accordingly, if rights can be asserted under the RLA, consolidations will inevitably be threatened, for it would then be "possible for either party to completely block any change in working conditions by refusing to agree to a change and refusing to agree to arbitrate." *BLE v. C&NW*, 314 F.2d at 431; *accord Nemitz v. Norfolk & Western Ry.*, 436 F.2d at 845; *Maine Central R.R., et al.—Exemption*, Finance Docket No. 30532, decision served September 13, 1985, slip op. at 7 (since, under the RLA, "there is no mechanism for insuring that the parties will arrive at agreement, there can be no assurance that the approved transaction will ever be effected"), *aff'd mem. sub nom. Railway Labor Executives' Association v. ICC*, 812 F.2d 1443 (D.C. Cir. 1987); *DRGW*, slip op. at 6 (if ICC approval "did not include authority for the railroads to make necessary changes in working conditions, subject to payment of specified benefits, our jurisdiction to approve transactions requiring changes of the working conditions of any employees would be substantially nullified"),

---

[38] Under section 6 of the RLA, 45 U.S.C. § 156, a party proposing to change "rates of pay, rules, or working conditions," must give notice to the other side and then negotiate over the proposed changes. If agreement is not reached, the process continues through mediation, voluntary arbitration, and conciliation. Throughout the process, the status quo must be maintained. The parties are not compelled to agree, however, and if in the end they cannot, they are free to resort to self-help. *Consolidated Rail Corp. v. Railway Labor Executives' Association*, 109 S. Ct. 2477, 2480 (1989).

Until now it has been thought "inconceivable," *Missouri Pacific R.R. v. United Transportation Union*, 782 F.2d at 112, that § 11341(a) should be read so as to preserve to labor the ability to veto the carrying out of a transaction the ICC has found to be in the public interest. That unsurprising conclusion directly reflects the intent of Congress, which has twice explicitly denied such power to labor;[39] it is inherent in this Court's decision in *Lowden* and has been explicitly endorsed by the four concurring Justices in *ICC v. BLE*.[40] The contrary holding of the Court of Appeals is wrong.

---

[39] At the same time, Congress has ensured that the interests of railroad employees are protected in consolidation transactions notwithstanding the operation of § 11341(a). Congress has instructed the ICC to consider "the interests of carrier employees affected by the proposed transaction," 49 U.S.C. § 11344(b)(1)(D), when considering a proposed merger or consolidation and, in § 11347, has mandated labor protective conditions to provide compensation for the changes in work arrangements that, as this Court recognized in *Lowden*, inevitably result from consolidations and related transactions. The "fair arrangement" now mandated by § 11347 includes wage protection for up to six years; and the ICC may, if circumstances warrant, impose a greater level of protection in favor of employees. Finally, the § 11341(a) exemption operates only as necessary to permit the carrying out of an approved transaction.

[40] Nothing in *Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Association*, 109 S. Ct. 2584 (1989), is to the contrary. That case involved a sale of rail assets to a newly formed "noncarrier" entity carried out under 49 U.S.C. § 10901. The transaction was not covered by the provisions of the Interstate Commerce Act governing consolidations of rail carriers, and the § 11341(a) exemption did not apply. Further, the transaction was similarly not subject to § 11347, and no labor protective conditions were imposed.

B. Congress Did Not, In 1976 Legislation, Render § 11341(a) Inapplicable To RLA-Derived Rights.

Respondent ATDA predictably will contend, as it did below, that even if the forerunners of § 11341(a) were once effective to displace RLA-derived rights, Congress nullified the applicability of § 11341(a) to the RLA in 1976—by amending the predecessor to § 11347. Such a contention would lack all merit.

Section 402(a) of the Railroad Revitalization and Regulatory Reform Act of 1976 ("4R Act"), Pub. L. No. 94-210, § 402(a), 90 Stat. 31, 62, amended 49 U.S.C. § 5(2)(f) (recodified in 1978 without substantive change as § 11347) to require that a carrier engaging in a transaction approved or exempted by the ICC provide a "fair arrangement" for its employees containing provisions "no less protective of the interests of employees than those heretofore imposed pursuant to [§ 5(2)(f)] and those established pursuant to section 405 of the Rail Passenger Service Act (45 U.S.C. § 565) [the Amtrak Act]." 90 Stat. 62. The protection afforded to employees pursuant to the Amtrak Act, in turn, refers to the so-called "Appendix C-1" conditions adopted by the Secretary of Labor in 1971 under that statute. *New York Dock Ry. v. United States*, 609 F.2d 83, 94 (2d Cir. 1979). ATDA has professed to see, in the incorporation of the Appendix C-1 conditions by reference in § 11347, a congressional directive that all existing collective bargaining agreements be preserved—unless employee consent to change is obtained through the RLA § 6 process—when railroads attempt to engage in transactions to which the protective conditions apply. ATDA is wrong.

First, the four concurring Justices in *ICC v. BLE* have already rejected the proposition that the amend-

ment of § 11347 in the 4R Act somehow removed the RLA from the scope of the § 11341(a) exemption. At least one of the union respondents in *ICC v. BLE* made exactly this argument, Brief of Respondent United Transportation Union, *ICC v. BLE*, at pp. 45-50; see 482 U.S. at 295 ("[t]he unions argued that . . . certain provisions of the Interstate Commerce Act" gave employees the right to perform particular work) (Stevens, J., concurring), and the concurring Justices necessarily found it wanting in concluding that § 11341(a) is effective to displace RLA-derived rights. ATDA's contentions are further belied by the decisions of the courts of appeals, since 1976, holding that § 11341(a) immunizes a carrier from all RLA-based claims, as necessary to permit it to carry out the transaction. *Railway Labor Executives' Association v. Guilford Transportation Industries, Inc.*, 843 F.2d 1383 (1st Cir. 1988) (per curiam), *aff'g* 667 F. Supp. 29 (D. Me. 1987), *cert. denied*, 109 S. Ct. 3213 (1989); *Brotherhood of Locomotive Engineers v. Boston & Maine Corp.*, 788 F.2d at 801; *Missouri Pacific R.R. v. United Transportation Union*, 782 F.2d at 111-12.

Further, the policy animating the 4R Act precludes the notion of a 1976 nullification of § 11341(a). Congress designed the 4R Act "to encourage mergers, consolidations and joint use of facilities that tend to rationalize and improve the Nation's rail system[.]" S. Rep. No. 499, 94th Cong., 1st Sess. 20 (1975), *reprinted in* 1976 U.S. Code Cong. & Ad. News 14, 34; *see Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Association*, 109 S. Ct. at 2596-97. Forcing a railroad desiring to carry out an approved transaction to abide by all the terms of existing

agreements, or to exhaust the protracted RLA § 6 procedure for changing them, would severely interfere with transactions and thereby retard the very policy Congress was hoping to advance. *See generally FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968) (court "cannot, in the absence of an unmistakable directive, construe [a statute] in a manner which runs counter to the broad goals Congress intended to effectuate").

Moreover, the Appendix C-1 conditions themselves never had the expansive meaning that ATDA would now wrongly read into them. ATDA's contention depends on the language in Article I, § 2 of the Appendix C-1 conditions, directing that rights under collective bargaining agreements be preserved,[41] which ATDA asserts must, by congressional mandate, now be included in any protective conditions the ICC imposes under § 11347. But the terms contained in Art. I, § 2 of Appendix C-1 are of limited and specific scope, and certainly do not erect a barrier to the application of § 11341(a) to the RLA.

The Appendix C-1 requirement applied only to the railroads contracting with Amtrak, *not* to Amtrak it-

---

[41] Article I, § 2 of the Appendix C-1 conditions provides:

> The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

This provision now also appears as Article I, § 2 of the *New York Dock* conditions. *New York Dock Ry.—Control—Brooklyn Eastern District Terminal*, 360 I.C.C. at 84.

self, *e.g., Baker v. System Federation No. 1*, 331 F. Supp. 1363, 1365-66 (E.D. Pa. 1971), reflecting the particular way in which Amtrak assumed operation of passenger train service. Initially, most of the railroads contracted to provide passenger service for Amtrak using their *own* employees.[42] Article I, § 2 of the Appendix C-1 conditions therefore had the unremarkable effect only of requiring, for example, that the labor agreements of Penn Central Transportation Company continue in effect when *Penn Central* performed services under contract for Amtrak. Later on, when Amtrak began to operate using its own employees, the Appendix C-1 conditions did not require Amtrak to assume the labor agreements that had been in effect on the railroads on which Amtrak employees formerly worked.[43] To the contrary, the Appendix C-

---

[42] Section 305 of the original Amtrak Act, Pub. L. No. 91-518, 84 Stat. 1327 (1970) contemplated this arrangement. The Amtrak Improvement Act of 1973, Pub. L. No. 93-146, 87 Stat. 548 (1973) removed this provision, reflecting Congress' intent that Amtrak convert to a scheme in which it would directly operate and control its service. S. Rep. No. 226, 93d Cong., 1st Sess., *reprinted in* 1973 U.S. Code Cong. & Ad. News 2324, 2325.

[43] At that juncture, Congress amended the Amtrak Act to reaffirm this point:

> Upon commencement of operations in the basic system, the [employee protection] requirements . . . shall apply to [Amtrak] . . . except that nothing in this subsection shall be construed to impose upon [Amtrak] any obligation of a railroad with respect to any right, privilege, or benefit earned by any employee as a result of prior service performed for such railroad.

Pub. L. No. 92-316, § 7, 86 Stat. 227, 230 (1972) (codified at 45 U.S.C. § 565). The accompanying Senate Report explained

1 conditions were predicated on the understanding that employees moving to Amtrak would *not* take their former labor agreements with them. The protection available for these employees was *compensation*, not a guarantee of "frozen" job conditions.[44]

ATDA would transform this circumscribed provision into a blanket preservation of existing labor agreements and RLA negotiating rights in connection with ICC-approved consolidations that present circumstances bearing no resemblance to those in which Article I, § 2 of the Appendix C-1 conditions itself applied. In effect, ATDA contends that in a statutory amendment expressly adopting language of continuity, not change, Congress reversed its long established course and en-

---

that the amendment was "designed to remove the fear . . . that Amtrak would have to assume all the obligations incurred by the railroads for those railroad employees who are later employed by Amtrak." S. Rep. No. 756, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 2393, 2399.

[44] Certainly the labor unions have never treated the language of Art. I, § 2 of the Appendix C-1 conditions as conferring the extraordinary rights that ATDA now purports to find there. The unions unsuccessfully *challenged* the Appendix C-1 conditions, claiming that they failed to meet the requirement of § 405 of the Amtrak Act that employees be afforded benefits not "less than those established pursuant to section 5(2)(f) of the Interstate Commerce Act," because the C-1 conditions established a procedure for the negotiation or, failing that, arbitration of implementing agreements that did *not* require that consummation of the transaction be deferred until an agreement had been reached. *Congress of Railway Unions v. Hodgson*, 326 F. Supp. 68 (D.D.C. 1971). In challenging the conditions, the unions did not suggest that employees already possessed, by virtue of the RLA, the far more potent right to require that, prior to consummation, railroads negotiate an agreement with the unions governing the terms of a transaction's implementation in accordance with RLA § 6.

acted, *sub silentio*,[45] the Harrington amendment and the unique restrictions that previously had been found only in the temporary ERTA Title I. That reading of the 4R Act has never been adopted by any court, or the ICC, and it is incorrect.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

JEFFREY S. BERLIN
(Counsel of Record)
MARK E. MARTIN
RICHARDSON, BERLIN & MORVILLO
2300 N Street, N.W.
Suite 625
Washington, D.C. 20037
(202) 663-8902

WILLIAM P. STALLSMITH, JR.
Three Commercial Place
Seventeenth Floor
Norfolk, Virginia 23510
(804) 629-2815

Attorneys for Petitioners

May 25, 1990

---

[45] The provision of the 4R Act amending § 5(2)(f) was a "last minute addition to the statute" without specific legislative history. *New York Dock Ry. v. United States*, 609 F.2d at 93. Congress' "silence is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely." *Edmonds v. Campagnie Generale Transatlantique*, 443 U.S. 256, 266-67 (1979).